TRAINING FOR THE PUBLIC PROFESSION OF THE LAW — A REPLY TO MR. KALES. — In the November issue of the REVIEW there appeared a book review by Mr. Albert M. Kales, of the Chicago bar, commenting upon "Training for the Public Profession of the Law," by Alfred Z. Reed, published by the Carnegie Foundation for the Advancement of Teaching. To this review Mr. Reed has written the following reply. While it has not been customary for the REVIEW to publish such replies, an exception has been made in this case, as it has seemed to the editors that the subject is one of extraordinary contemporary interest. — ED.

SCHOLARSHIP OR OPINION?

Mr. Albert M. Kales, reviewing my volume, "Training for the Public Profession of the Law," in the November number of the HARVARD LAW REVIEW,[1] complains at the outset that he finds it difficult to understand what I mean, in the last of my eight "Parts." This criticism could certainly not be directed against any portion of his own refreshingly vigorous comments. These do not, as it seems to me, convey to the uninformed reader an accurate impression of the scope and purpose of my volume, but they make entirely clear Mr. Kales' views in regard to certain matters. In spite of my lack of clearness, he proceeds confidently to assume that he knows what I am "driving at," and on this precarious basis he gives me a trouncing which — if his assumptions were correct — I should richly deserve. He then devotes three of his six pages to reiterating views, with which he has long been identified, in regard to the importance of teaching only local law, and scolds me, by name — though always with courtesy — for not agreeing with him. Finally, his concluding words are these: "Is this the beacon which is to fire the imagination of young men stirred by the recent conflict?" He implies quite plainly, first, that I have lighted no such beacon — which is obvious — and second, that I ought to have done so — which I think is open to question.

I

Mr. Kales is entirely correct in drawing attention to the verbal obscurity and substantial vagueness of my constructive proposals. Whether he is equally correct in imputing this to me as a defect, I am not so certain. The assurance with which he expresses himself in regard to highly contentious matters is admirable in the case of one who, like himself, has devoted his entire life to the practice and teaching of the law. I had thought that a similar tone would be somewhat out of place in the case of one who has devoted only eight years of study to law and legal education. Many disputable points are involved in this general topic. Nothing like common agreement exists among men whose opinions deserve respect. From the beginning it has seemed to me wise, therefore, to subordinate my own slowly crystallizing views to a statement, as nearly dispassionate as I could make it, of facts. I have thought that a concrete plan of reform, with all of its details perfected, would receive the treatment that is usually and rightly accorded to attempts of closet philosophers to regenerate the world. When, therefore, Mr.

[1] 35 HARV. L. REV. 96.

Kales dignifies my occasionally obtruded opinions by a six-page refutation, he seems to me to accord them greater importance than they deserve. If my statement of the facts is fairly comprehensive and clear, I doubt whether the value of a five hundred page study would have been enhanced by additional pages devoted to propaganda.

It may be that at some future date I might profitably explain more fully just what I mean when I declare that we not only always must have, but already actually do have, a "differentiated" bar. Discussion of this proposition would certainly contribute to my own enlightenment. In addition, a controversy, proceeding from this starting point, might entertain and possibly would even benefit others. Before I amplify my own tentative views, however, I should require some assurance that any real interest is taken in them. Such interest does not seem to be displayed by one who jumps to the conclusion that all I am "driving at" is "the division of lawyers into the strong and successful on the one hand and the weak and mediocre on the other"; this division to be determined largely by considerations of social position.[2] A critic who tortures my obscure and scattered "hints" into support of any such ridiculous proposition as this seems to me more eager to protect his own opinions against attack than to ascertain what merit, if any, there may be in my position.

II

I cannot, however, pass over these opening pages of Mr. Kales' review without calling attention to one remarkable proposition that he advances. With some glimmering perception of what, under my verbal infelicities, I really am "driving at," he boldly asserts that "no differentiation can be based upon . . . the original educational effort of college and law school." His argument is that success at the bar "is a matter of competition," in the course of which the lawyer's original formal education, "while it may leave some marks, fades out very materially."[3]

Now of course in the past, when law schools were less efficient institutions than they are now becoming, and when the law was less complex than it is to-day, it has undoubtedly been true that experience, rather than education in a narrow sense, has been the determining factor in furthering success at the bar. The training received prior to admission to practice has contributed a relatively small amount to the fund of knowledge and of practical expertness which the accomplished lawyer displays. Practitioners whose native abilities have enabled them to counteract the defects of their early education are peculiarly liable to place a low estimate upon the importance, actual or potential, of formal preliminary training. Is this to be a permanent condition, however? Will the kind of preliminary training that lawyers receive never amount to much, one way or the other, either as a ground for forecasting that they will probably be successful or unsuccessful, or as a basis for dividing them in any other way? Will that part of a lawyer's proficiency which he secures at the expense of his early clients always bulk so large in the final result that it will make very little difference what sort of law school he has attended, or whether indeed he has attended any?

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[2] 35 HARV. L. REV. 98.

[3] *Ibid.*

This may be true. The knowledge or skill required to practice many vocations can best be acquired almost entirely from experience, after a relatively unimportant grounding in general or technical preparation. It may be that the practice of the law is one of these vocations — that it is not now, and cannot be converted into, a genuine learned profession that requires an elaborate formal preparation before it may be properly pursued. If this is true, then indeed the publication of the recent Carnegie bulletin represents an entirely unnecessary waste of labor and time. It is part of a quite needless current pother about advancing the standards of law schools and of bar admission requirements.

III

Mr. Kales does not, however, really believe that law schools are of negligible importance in the making of lawyers; for half of his entire review is taken up by a vigorous declaration that law schools should now abandon the pretense of teaching a non-existent "national law," and should devote themselves in future to teaching the concrete law of their own jurisdictions. Here again he may be correct. His argument is certainly convincing as to one not unimportant point: The Harvard Law School faculty recently included at least one professor who definitely repudiated the original concept of Dane and Story and Langdell. These worthies may well have been wrong. The attempt to realize their ideals has always been carried on under considerable practical difficulties. Perhaps because of these difficulties we should now abandon the attempt. Law schools which now contain students from many jurisdictions must either, in order to be good law schools, teach many different and independent systems of law concurrently; or, if this is a task which, for reasons outlined in my Chapter XXV, is beyond the resources of any school, then students from different jurisdictions should cease to come to a single law school. The Harvard Law School should confine itself to Massachusetts students, and the Michigan Law School to those of Michigan. It may be, in short, that the conceded difficulty of preventing our law from becoming permanently and increasingly disintegrated should now be rendered an utter impossibility. We should abolish a type of legal study which in the past has done something — and which Mr. Kales apparently concedes is still doing something — to arrest the naturally disruptive tendencies of our political organization.

I am not myself competent to phrase the argument against this position more adequately than I have phrased it in various passages of my volume. Not being a lawyer or a law teacher myself, my words in any case carry little weight. This much I will concede to Mr. Kales. If the present faculty of the Harvard Law School feel about this matter in the way that he does, then the sooner this school abandons the farce of pretending to teach national law, the better. On the other hand, if this faculty still includes scholars who hold that there is a fundamental integrity to our common American law which should by all means be preserved, lest the law of these United States become like that of Continental Europe prior to the adoption of the Code Napoléon — then it would seem incumbent upon them to reply to their late colleague. They can do so more effectively than I can.

I will accordingly restrict my own comment upon this portion of the review to two relatively unimportant observations.

Mr. Kales, who seems to have the same respect for me as an historian — I do not mean this sarcastically — that I have for him as a legal scholar and writer of forceful English, says [4] that I know how the English universities, with their teaching of Roman or civil law, became sidetracked in the development of English law and legal education. He condemns me, accordingly, for my incapacity to grasp the, to him, obvious truth that, if our own university law schools cling to their conception of national law they will be sidetracked in a similar manner by schools that teach the actual law of local practitioners. I waive the question whether, in a discussion covering local law, the development of the law of continental Europe does not provide a closer parallel, and whether the teaching of imperial Roman jurisprudence by the continental universities was not the precise cause that prevented the law of their states from becoming permanently disintegrated. Does he not overlook a vital defect in his own analogy? The graduates of the English universities did not enter into legal practice until after they had gone through the Inns of Court and learned the actual, living, de-academized "common" law. Even so — I have been told by those who know more about such matters than I do — a tincture of the civil law was infused into the English common law, by judges who had studied its principles in the universities. Whether this civil law element did much good to the practitioners' common law or not, I do not know. I rather suspect that those who may be interested in proving the point could show that it did. In any case, it crept in. Now perhaps the graduates of our national law schools ought similarly to go subsequently to a local law school, in order to get some of the theoretical nonsense out of their systems. Or perhaps they ought not. I myself rather incline to the latter view, believing that the gap between our own national and local law is far less wide than that between the civil law and the bureaucratically developed rules of the English courts; and that even now American national law can be and is taught in a fairly concrete and practical manner. However this may be, it seems to me clear that if the graduates of such schools do enter a local law school, they will be in as favorable a position for influencing the development of the law as was the university trained lawyer of England; and that if, on the other hand, they proceed, as now, directly into practice, they will be in a much more favorable position.

If a sufficient number of young men enter the legal profession, after being saturated with the spirit of the national law, they are likely to make their mark felt, if indeed they have not already begun to do so. To the extent that they are elevated to judicial positions — as some of them already have been — or produce good textbooks — as more of them might, — there is a possibility that what is now regarded as theoretical nonsense by many may be respected as genuine law by all. This weight of mere numbers must be taken into account in any attempt to forecast the probable development. Harvard could accomplish little in this direction when Harvard was standing alone. The large and increasing number of schools that are imbued with Harvard ideals may reasonably

[4] 35 HARV. L. REV. 101.

hope to accomplish much more, particularly in case their efforts are reinforced by schools of different immediate aims, which employ, however, national-law textbooks for a portion of their curriculum. All this will, of course, take time. But *if* the opposition of older practitioners to this development is wrong, and *if* the constantly growing number of younger men are as forceful in the defense and promulgation of their point of view as Mr. Kales is in his, the chances seem to favor their eventual triumph.

In a word, it is submitted that the question that should properly be discussed is whether a national common law, or, if this cannot be attained, then at least a law that is much more nationalized than that which we now possess, would or would not be of inestimable advantage to the people of our not quite sufficiently united country. If it would be, then there is no reason why those to whom this ideal appeals should be discouraged by the fact that its full realization can be secured only at the cost of much time and labor.

As has just been intimated, it is not likely that the national law schools, of themselves, can bring this state of affairs to pass. For a long while, and perhaps permanently, local law schools will continue to exist. These will exert a powerful influence to block this development, unless by good teaching from good textbooks, some of which at least must be provided by the national schools, their forces can be turned in the same general direction. This brings me, however, to the second observation that I propose to make upon Mr. Kales' argument in favor of a unitary type of local law school. He asserts that I conceive "that the study of the local law must always remain narrow, practical, and inferior, and be carried on by part-time or low-standard schools." [5]

This is a most extraordinary assertion. Of course, we both of us recognize that there is a sense in which the study of local law may be said to be more "practical" than that of national law. The only basis that I can find for the remainder of the statement, however, is my expression of belief that part-time law schools will naturally emphasize local law.[6] The sentence as a whole is fundamentally at variance with views that I entertain with regard to the perfectibility of local, part-time instruction in the law — views which, whether right or wrong, whether important or unimportant, have at least been expressed with sufficient clearness to be understood by other critics of my volume. I trust that I shall not be considered discourteous or small-minded if I harbor the suspicion that Professor Kales has given to my Chapter XXV and to my concluding chapters only that measure of attention which he believes they justly deserve. He seems not to have read these parts of the volume with that degree of care which is commonly supposed to be one of the unfortunate responsibilities of a painstaking reviewer.

IV

Finally, a word as to that beacon light the absence of which from my volume Mr. Kales so emphatically deplores. No, I have not lit a beacon. My readers will find here at most a feeble tallow dip, hidden

[5] 35 HARV. L. REV. 101.
[6] TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, 412.

under a bushel of historical data and statistical tables. Are these latter — as Mr. Kales seems to intimate — erudite, but of little practical value? If so, I am sorry; for I had hoped that a careful statement of the facts, coupled with an indication of some of the many problems they suggest and of the general way in which, as it seems to me, these problems will have to be approached, might be of some slight assistance to the coming generation of legal scholars. This was a more modest aim than that which Mr. Kales imputes to me, but for whatever value such work may possess, this was what I was actually trying to do. This would have been clearer to the readers of his review had he seen fit to quote my full title: "Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States, with some Account of Conditions in England and Canada."[7] A clumsy title, this. Mr. Kales' gift of terse expression is not mine. But it brings out better than does his own more readable criticism what I aspired to do. This was — to continue his metaphor — merely to gather fuel for any beacons that others may feel themselves competent to light. I am gratified that Mr. Kales has already applied the torch of his eloquence to my dry material. I hope that the blaze of scholarly discussion which — in admirable temper — he has kindled, may spread, and that we shall all be benefited by the resulting illumination.

ALFRED Z. REED.

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[7] The failure to quote the full title is chargeable to the editor rather than to the reviewer. — ED.